Vinyl-Fab Industries, Inc. *and* **District Lodge 60, International Association of Machinists and Aerospace Workers, AFL–CIO and Vinyl-Fab Employee Group, Party in Interest.** Case 7–CA–17816

December 16, 1983

DECISION AND ORDER

On August 11, 1981, Administrative Law Judge John H. West issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief. The National Labor Relations Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

The Administrative Law Judge found that Respondent violated Section 8(a)(1) by threatening employees with loss of jobs, layoffs, discharges, and more onerous working conditions if the Union became the employees' bargaining representative. He also found that Respondent violated Section 8(a)(1) by soliciting and promising to remedy employee complaints. The Administrative Law Judge also found that, in view of the nature and extent of Respondent's unfair labor practices, a *Gissel*[2] bargaining order is warranted to remedy effectively Respondent's unlawful conduct.

Although the entire Board joins in affirming the Administrative Law Judge's findings relating to the violations of Section 8(a)(1), our dissenting colleagues are unwilling to find that a bargaining order is both necessary and appropriate. In our view, the dissenters' refusal to join in issuing a bargaining order represents a failure to consider adequately and weigh fully the relevant facts and circumstances of this case[3] in a manner that is consistent with longstanding Board precedent. Indeed, we believe that the serious, widespread nature and repetitiveness of Respondent's threats, solicitations, and promises, the small size of the bargaining unit, Respondent's swift retaliation against the organizing campaign, and the fact that the individuals making the threats clearly had the authority to carry them out compel the conclusion that a bargaining order is required.

The serious impact of Respondent's unlawful conduct on its employees cannot be questioned. We have consistently held that threats of job loss and more onerous working conditions in the event of a union victory are among the most egregious and flagrant means by which an employer can dissuade employees from selecting a bargaining representative.[4] We have also often found that Respondent's solicitation of employees' complaints with promises to remedy them "must, of necessity, have a strong coercive effect on the employees' freedom of choice, serving as it does to eliminate by unlawful means and tactics the very reason for a union's existence."[5] Here, in a span of less than 3 weeks, Respondent, through its president and plant manager, repeatedly engaged in both types of unlawful conduct. On April 21, 1980,[6] during the very first moments of the organizing campaign, Respondent's plant manager, Graham, threatened the leading union activist, Pierson, that employees would lose jobs and be subject to more onerous working conditions if the Union's organizational campaign was successful. The following day and again 9 days later, Graham gave Pierson written warnings which were nothing more than thinly veiled threats of discharge because of Pierson's union activities. On April 28, just 4 days after the Union advised Respondent that it had signed authorization cards from a majority of employees and demanded recognition, a meeting was held involving Respondent's president, co-owner, treasurer, plant manager, and all its employees at which time Respondent's president solicited employee complaints and impliedly promised to correct them. The following day, all employees received a letter signed by the president in which he solicited employee complaints, expressly promised to remedy complaints discussed at the previous day's meeting, and ended the letter by stating that "the Union was *not* necessary to gain your desired improvements." Finally, on May 8, just 3 days after the Union filed a representation petition, the president held another meeting with the employees, where he threatened layoffs, more onerous working conditions, and stricter work rules and solicited employee complaints.

The seriousness of Respondent's unlawful conduct is intensified when the surrounding circum-

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] *N.L.R.B.* v. *Gissel Packing Co., Inc.*, 395 U.S. 575 (1969).

[3] See *El Rancho Market*, 235 NLRB 468, 475 (1978).

[4] *El Rancho Market*, 235 NLRB at 476. Also see *General Stencils, Inc.*, 195 NLRB 1109, 1110 (1972), where the Board issued a bargaining order based upon the employer's threats of job loss coupled with a few minor violations.

[5] *Apple Tree Chevrolet, Inc.*, 251 NLRB 666, 668 (1980); also see *Teledyne Dental Products Corp.*, 210 NLRB 435 (1974), where the Board issued a bargaining order based upon the employer's "pernicious conduct" of soliciting employee grievances, promising rectification, and granting one of the employee demands.

[6] All dates are 1980 unless otherwise indicated.

stances are considered. The bargaining unit was small, consisting of only 27 employees, and the threats and solicitations were unitwide.[7] Nor were the threats and solicitations made by a minor representative of management; rather, they were made by Respondent's president and plant manager, and Respondent's co-owner was present at both employee meetings to stress further the import of its threats and solicitations. As we have often held, threats by such individuals, who clearly possess the power to turn such threats and promises into reality, will be seriously regarded by employees.[8] Further, Respondent's unlawful conduct was not *de minimis* nor made in an offhanded manner, but rather from the outset of organizational activity it was repeated many times in a short period of time using a variety of methods[9] to ensure that it was heard and understood by all. Respondent's actions are "measurably heightened by the fact that the Company's unlawful activities commenced immediately on the first stirring of employee interest in the Union and were concentrated in such a brief timespan."[10] Finally, Respondent's unlawful course of conduct continued after the filing of the Union's representation petition, thus demonstrating Respondent's continued hostility toward the Union during the election campaign.[11]

In refusing to issue a bargaining order, the dissent seems to hold that a bargaining order is appropriate only when a respondent takes actions to implement its threats. This approach, which rewards respondent for using threats to blunt employees' Section 7 rights, is contrary to the Supreme Court decision in *Gissel*.[12] Furthermore, experience has shown that an employer, by repeatedly threatening employees that unionization would endanger their employment and working conditions and by promising that their complaints will be more easily rectified without a union, leaves a significant imprint on employees which is not easily dissipated with the passage of time.[13] Furthermore, a bargaining order is designed as much to remedy past misconduct by a respondent as it is to deter future misconduct.[14]

Based on the above, we conclude that "the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance be better protected by a bargaining order."[15] Accordingly, we affirm the Administrative Law Judge's finding that a bargaining order is both necessary and appropriate.[16]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, and hereby orders that the Respondent, Vinyl-Fab Industries, Inc., Livonia, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

CHAIRMAN VAN DE WATER AND MEMBER HUNTER, dissenting in part:

We agree with our colleagues that Respondent violated Section 8(a)(1) by soliciting and promising to remedy employee complaints, threatening one employee with more onerous working conditions, layoffs, and possible discharge, and threatening employees as a group with possible layoffs and more onerous working conditions if the Union became the employees' bargaining representative. We are unable to conclude, however, that the possibility of erasing the effects of Respondent's unfair labor practices through our traditional remedies is slight and that employee sentiment would, on balance, be better protected by a bargaining order.[17] Accordingly, we would not issue a bargaining order against Respondent here.

At the outset, we feel certain that our colleagues agree in principle (if not always in practice) that a bargaining order predicated on a union's card majority rather than a Board-conducted secret-ballot election ought not be routinely granted. Indeed, as

[7] See *Ste-Mel Signs, Inc.*, 246 NLRB 1110 (1979); *Bighorn Beverage*, 236 NLRB 736, 754 (1978). Furthermore, although some of the threats of discharge and more onerous work conditions were made only to Pierson, we have often held that threats with such serious consequences for all employees will inevitably be discussed among all employees. *General Stencils, supra.*

[8] *General Stencils, Inc., supra; Ed Chandler Ford, Inc.*, 254 NLRB 851 (1981). We find it unnecessary to debate with the dissent whether threats not carried out are more serious than those partially brought to fruition. The failure of an employer to compound its violation by not carrying out illegal threats provides no justification for refusing to issue an order that is warranted by the nature and severity of the illegal activity found to have been undertaken.

[9] As shown above, Respondent's "methods" included threatening the leading union adherent about the dire consequences of his actions, employee meetings conducted by the president, and sending a letter to all employees signed by the president.

[10] *Armcor Industries, Inc.*, 227 NLRB 1543, 1544 (1977).

[11] *C. W. Wilkerson & Sons, Inc.*, 255 NLRB 1367 (1981).

[12] *N.L.R.B.* v. *Gissel Packing Co., Inc.*, 395 U.S. at 610, 612.

[13] *Chandler Motors, Inc.*, 236 NLRB 1565, 1567 (1978); *Viracon, Inc.*, 256 NLRB 245 (1981). Also see *General Stencils, Inc., supra; Teledyne Dental Products Corp., supra.*

[14] *N.L.R.B.* v. *Gissel Packing Co., Inc.*, 395 U.S. at 612.

[15] *Id.* at 614–615.

[16] Based on the evidence as described above, we also find in, agreement with the Administrative Law Judge, that a broad order is warranted since Respondent has engaged in such widespread misconduct as to demonstrate a general disregard for employees' fundamental statutory rights. See *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979).

[17] See, generally, *N.L.R.B.* v. *Gissel Packing Co., Inc.*, 395 U.S. 575 (1969).

the majority itself states, the facts and circumstances of each case must be weighed fully and carefully to determine whether an employer's actions are of such a nature as to render traditional remedies probably ineffective in assuring that employees can make a free and informed election choice. In purporting to do so in the instant case, however, we fear that the majority opinion pays undue deference to previous cases in an effort to demonstrate that a bargaining order is "compelled" by the facts presented here. After all, there is no disagreement as to the applicable legal principles and the only question presented is a factual one: Were Respondent's actions of such a nature as to render the chances slight that employee sentiment could accurately be measured through an election after application of the Board's traditional remedies. We say no, while the majority says yes. Yet, neither position, we submit, is dictated by precedent.[18]

Accordingly, we are reluctant to engage the majority in a "dual of facts" in which they cite cases where violations similar to those here are found to be "pernicious conduct"[19] and we cite cases where similar violations resulted in no bargaining order.[20] For the danger in such battles is twofold. First is the simple fact that no two cases are exactly alike. Each has factors in it that are not repeated elsewhere in the same context. Perhaps more importantly, such wars of "one upsmanship" inevitably result in the Board seeking to categorize the severity of individual violations in such draconian terms that our credibility is diminished and our coin of the realm "agency expertise" is greatly debased. For example, in *Teledyne, supra*, cited by the majority, the Board says of a respondent's unlawful solicitation and remedying of grievance that "We can conceive of no more pernicious conduct than that which is calculated to undermine the Union and dissipate its majority while refusing to bargain."[21] Putting aside the fact that this Board, every day, sees cases that are surely more "pernicious" we move to *El Rancho Market*, 235 NLRB 468 (1978), where the threat of job loss and plant closings were termed "among the most serious and flagrant forms of interference with employees' Section 7 rights."[22] Indeed, we feel certain that a thorough review of the Board volumes would reveal that virtually all 8(a)(1) conduct has been termed, at one time or another, "the most egregious," "most pernicious," or "most destructive conduct" an employer could engage in.

Again, we wish to emphasize that we are not here denigrating the importance of precedent or the value of our Agency's experience. Our simple point is that *all* violations of the Act are serious and potentially devastating in their impact on employee rights; so the use of dramatic language in characterizing them does little to provide meaningful analysis. And, while the facts of one case may dictate a bargaining order, such a case, even in combination with others, does not necessarily compel a bargaining order in a subsequent case.

Turning to the facts of the instant case we find that one employee was threatened with discharge and more onerous working conditions and layoffs for other employees. Then, in two speeches, Respondent President Brown solicited employee complaints and impliedly promised to remedy them and also threatened possible layoffs and more onerous working conditions if the union effort were successful. Finally, in a letter to employees, Respondent solicited complaints and promised to remedy them.

Plainly, the foregoing unfair labor practices are not *de minimis* or "technical" violations. On the other hand, we believe it significant that Respondent took no unlawful disciplinary action against any employee or group of employees. For example, Respondent did not unlawfully transfer, lay off, or discharge any employees. It did not unlawfully assist the rival union, remedy grievances, or threaten to close the plant. Had sufficient conduct of such a nature actually occurred, perhaps we would strike the balance differently. Based solely on the nature of violation that did occur,[23] however, we are unable to conclude that Respondent's *overall* actions compel the extraordinary remedy of a bargaining order.

[18] We respectfully submit that the tendency reflected by the majority view to "pigeonhole" cases and types of violations is, in part, the cause of much of the criticism visited upon the Board by the circuit courts in bargaining order cases. See, e.g., *Peerless of America, Inc.* v. *N.L.R.B.*, 484 F.2d 1108 (7th Cir. 1973); *N.L.R.B.* v. *K & K Gourmet Meats, Inc.*, 640 F.2d 460 (3d Cir. 1981).

[19] *Teledyne Dental Products Corp.*, 210 NLRB 435 (1974).

[20] *Dependable Lists, Inc.*, 239 NLRB 1304 (1979).

[21] *Teledyne, supra* at 435–436.

[22] 235 NLRB at 476. Despite our expressed reluctance to duel over the facts, we feel compelled to note that there are no threats of plant closure here and, in addition, the litany of egregious and pervasive unfair labor practices in *El Rancho* is hardly comparable to those in the instant case.

[23] Contrary to the majority's accusation, we do not believe that threats are only significant for bargaining order purposes when they are carried out. Instead, we are simply stating what we believe to be obvious; namely, that certain unfair labor practices are more serious in their impact on employees than are others.

DECISION

STATEMENT OF THE CASE

JOHN H. WEST, Administrative Law Judge: This case was heard in Detroit, Michigan, on March 2–5, 1981,

pursuant to a charge filed on May 27, 1980,[1] as amended on July 7, by the above-captioned Union and a complaint which was issued on July 16. A timely answer was filed on August 1. The complaint alleges that Respondent violated Section 8(a)(1), (2), (3), and (5) of the National Labor Relations Act, as amended (the Act), in that allegedly it (1) threatened employees by stating that it would impose more onerous working conditions on them and that employees could lose their jobs if the Charging Party's organizational campaign were successful, (2) threatened to discharge an employee because of the employee's union activity, (3) solicited employees' complaints and impliedly promised to remedy said complaints, all for the purpose of blunting the Charging Party's organizational campaign, (4) stated that Respondent's plant would close if the Charging Party's organizational drive were successful, (5) remedied employee complaints concerning safety problems in the plant for the purpose of blunting the Charging Party's organizational campaign, (6) dominated, controlled, and rendered unlawful aid and assistance and support to the Vinyl-Fab Employee Group, (7) assigned specified employees to work together on one of its production machines and did not offer said employees the same opportunities to perform other tasks as it offered other employees because of the specified individuals' activities on behalf of and sympathies for the Charging Party, (8) permanently laid off specified employees because of their membership in, activities on behalf of, or sympathies for the Charging Party and/or as reprisal for certain employees engaging in activities on behalf of the Charging Party, (9) did refuse and continues to refuse to recognize and bargain collectively with the Charging Party as the exclusive collective-bargaining representative of all its maintenance and production employees, and (10) has engaged in the above-specified acts and conduct in order to undermine the representative status of the Charging Party, to dissipate and destroy its majority standing, and to render impossible the conduct of an uncoerced election. It is alleged that the unfair labor practices described above are so serious and pervasive in character as to preclude the holding of a fair representation election and warrant the entry of a remedial order requiring Respondent to recognize and bargain with the Charging Party as the exclusive collective-bargaining representative of the maintenance and production employees.

The relief sought includes the following affirmative action on the part of Respondent: (1) upon request recognize and bargain collectively with the Charging Party as the exclusive representative of the maintenance and production employees, (2) withdraw any recognition it may have accorded Vinyl-Fab Employee Group or any of its successors, (3) immediately reinstate specified individuals to their former positions of employment, without prejudice to their seniority or other rights and privileges previously enjoyed and make those employees whole for any loss of pay, and (4) post the appropriate notices to employees.

Upon the record, including the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and Respondent, I hereby make the following:

[1] All dates are in 1980 unless otherwise stated.

FINDINGS OF FACT

I. JURISDICTION

Respondent, a Michigan corporation, is engaged in the manufacture, sale, and distribution of swimming pool covers and related products at its plant in Livonia, Michigan. During the year ending December 31, 1979, Respondent purchased and received goods and materials valued in excess of $50,000 which were transported and delivered to its plant directly from points located outside the State of Michigan. The Company admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Union[2] is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Those Dealing With Section 8(a)(1), (3), and (5)*

On or about April 21 employee Eric Pierson openly began an organizing campaign for the Union by soliciting signatures on authorization cards, passing out literature, and discussing the Union with his coworkers at Respondent's Livonia plant.[3] During the second break that day, Plant Manger Dennis Graham joined Pierson and a group of employees who were signing authorization cards. One of the employees asked Graham for his opinion and he replied, "I think that unions are doing more harm than good."

Later that afternoon Pierson was asked by Graham to come to his office. No one else was present. Graham advised Pierson that he wished to engage in a person-to-person dialogue *vis-a-vis* a manager to employee discourse. Graham had previously worked at the Ford Motor Company and he advised Pierson of this and described his perception of a union environment as garnered at Ford. Specifically, he indicated that in a union environment there are a lot of rules and regulations; that a number of unspecified employees of Respondent, with their records and current work habits, would not be able to be employed in the union environment he knew;[4] that,

[2] Unless indicated otherwise, references to the Union will be to District Lodge 60, International Association of Machinists and Aerospace Workers, AFL-CIO.

[3] Previously he had met with union representatives on more than one occasion. Two of his coworkers attended one of these meetings on April 16, and the three employees signed authorization cards. The following day the Union sent a certified letter to George Brown, president of Respondent, advising him that the Union was conducting an organizing campaign; that employees Pierson and Gerlon Moore were to assist the Union during the campaign; and that any action that Respondent took against these or other of its employees who support the Union would lead to the filing of unfair labor practice charges. (G.C. Exh. 3.) It is stipulated that Brown received this letter on or about April 21 and Brown testified that he received the correspondence on what would be April 22.

[4] In rendering his version of this conversation, Pierson testified that Graham said five to seven of Respondent's employees could be "fired." Graham testified that he did not say anything about a loss of jobs at Vinyl-Fab. As noted, *infra*, Pierson's credibility was seriously compro-

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with respect to stricter working conditions being imposed if the Union were successful, it was his observation that job comfort in the union environment he knew was very, very low; that unions generally negotiate higher salaries and it is often necessary to find alternate ways of manufacturing which are more economical such as automation; and that the hiring of part-time workers is not encouraged by unions. Graham said that Pierson did not know what was really involved, that Pierson regarded the attempt to organize as a "toy" or a "how I spent my summer vacation" project,[5] and that Pierson should go to the library and do some reading on the subject.

The following day Pierson was called to Graham's office. He was presented by Graham with a two-page memorandum dealing with "TARDINESS." The first page listed dates and times from January 1 through April 15.[6] The second page reads:

> THIS PRACTICE OF CONTINUALLY BEING LATE INTERFERES WITH PRODUCTION AND RESULTS IN LOST TIME BOTH FOR YOURSELF AND OTHER EMPLOYEES. *IF YOU CONTINUE TO BE TARDY, IT WILL BE NECESSARY TO TERMINATE YOU FROM EMPLOYMENT WITH VINYL-FAB.*

The memorandum was signed by Dennis Graham. This was the first written tardiness warning Graham gave to an employee since he became plant manager in December 1979.[7] When asked why he waited until April 22 to give Pierson the written warning, Graham replied that previously Pierson was in the maintenance area and he was not treated "absolutely the same as other employees."

Later that afternoon, according to Pierson, one of Respondent's leaders,[8] Lang, told him that Graham had told her that unions cause production quotas and restrictions and would cause some of Respondent's employees to be "fired." On cross-examination, Pierson, after determining that the affidavit he gave to a Board agent previously did not contain the word "fired," testified that he did not recall whether Lang said "fired." Lang denies that Graham ever told her this or that she ever said this to Pierson. I am hesitant to rely on Pierson's testimony where his assertions are denied and are not corroborated. In the circumstances, Lang's assertions are credited.[9]

On April 24, the Union forwarded a certified letter (G.C. Exh. 4) to Brown advising him that a majority of Respondent's involved employees authorized and designated the Union as their collective-bargaining representative.[10] An offer was made to submit the authorization cards to some mutually agreed impartial third party and recognition was requested. Four days later Respondent's counsel advised the Union in writing that Respondent would not recognize and bargain with the Union.

Also, on April 28, Brown met with Respondent's employees at the plant after work. The meeting was called apparently because some of Respondent's employees indicated to Graham that they had some questions on "company impressions of the union activity."[11] Brown acceded to Graham's request to speak to the employees after speaking with legal counsel who advised him not to make any promises or threats. The meeting was opened by Brown with a statement that he was not sure what he could or could not say and he wanted to know whether the employees had any questions. Several witnesses testified about what was said or done during the meeting. There is some disagreement. However, certain determinations can be made. First, those present consisted of Brown, Billard, Larry Evans, who is co-owner and vice president of sales, Graham, the three leaders, and the employees. The sum and substance of what occurred appears to be as follows:

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mised at the hearing when Respondent introduced business records which demonstrate that certain of Pierson's testimony was not factual. Consequently, there is some doubt im my mind that Graham actually used testimony regarding whether someone else (leader Carol Lang) used the word "fired" in describing what might happen at the plant. But while Graham may not have explicitly stated that some employees would be "fired" or "lose their job" the all-to-obvious implication was that, if the Union came in, certain employees would not be retained.

[5] Pierson had taken time off from college while he was working for Respondent.

[6] According to the list, Pierson was tardy on 69 occasions during the above-described period. As pointed out by Pierson, 27 of these instances involved being late by more than 7 minutes. Pierson admitted that he probably had the worst tardiness record in the plant.

[7] On direct, Pierson testified that no one had ever said anything to him before about his tardiness, and he was going to wait until someone mentioned it before clearing it up. On cross-examination, Pierson testified that in March 1980 he asked Graham if his tardiness would affect his evaluation and Graham replied no. Graham testified that he received numerous complaints from other workers about Pierson's tardiness, among other things. In March 1980 when Pierson told Graham that he wanted to continue to work until he went back to school in September, Graham advised him that he would have to become a regular production worker (until then, Pierson performed odd jobs at the plant involving mostly maintenance), and that he would have to improve regarding tardiness.

[8] The status of the leaders in the management hierarchy at Respondent's plant will be treated *infra.*

[9] Lang also denies that she had a conversation with Pierson in mid-April about (1) being on the organizing committee, (2) whether Brown would "have to okay a union," and (3) whether a union vote had to be unanimous. Additionally, Lang denies saying, "okay if this will help" when she gave her signed authorization card to Pierson on April 24. And she denies that Graham ever told her that, if the Union came in, the plant would close or that she told everyone in the plant that Graham said this. Pierson testified to the contrary but his assertions were not corroborated. Graham testified that he never told Lang that the plant would close if the Union came in. In the circumstances, Lang's testimony is credited.

[10] By April 24, 19 employees and Lang had signed authorization cards. At that time there were 23 employees and 3 leaders. Two other employees signed authorization cards in May. The cards read:

> YES, I WANT THE IAM
>
> I, the undersigned, an employee of (Company) hereby authorize the International Association of Machinists and Aerospace Workers (IAM) to act as my collective bargaining agent with the company for wages, hours and working conditions.

They were received in evidence at the hearing herein and their validity is not questioned.

[11] The nonleader employees who did testify herein indicated neither they nor their coworkers, in these witnesses' presence, requested the meeting. When Brown asked at the beginning of the meeting for questions no one replied. Pierson, at Brown's prompting, then asked a question but he did not request the meeting. Leader Lang, who testified that she requested the meeting because she had some questions she wanted to ask, later testified that the only reason she wanted to hold the meeting was to see what Brown and Respondent's treasurer, Rollie Billard, had to say. On the other hand, Graham testified that employees Olson, Shillard, Borowski, and Will requested the meeting. This testimony was not refuted. On direct, Pierson testified that this meeting was the first time management met with employees. On cross-examination, he testified that Graham did hold meetings with employees.

Brown asked the employees for their concerns.[12]

He does not deny that he personally noted on a pad what the employees said during the meeting.[13]

Brown, in his response to a question regarding how the Company was doing, did say something to the effect that it is doing quite well.[14]

Brown asked Pierson for a copy of a list of safety complaints Pierson showed Brown.

Brown indicated that he could not make any promises.

Pierson asked why he was not allowed to rotate jobs. Brown expressed ignorance of the situation. Graham said he was not aware that Pierson wanted to rotate and that in the future Pierson would be rotated.

Regarding this last matter, Pierson testified on direct that, on or after April 21 when he began to openly organize, he was assigned to work on the Thermatron sealing machine (also called the dielectric machine) 8 hours a day, every workday; that the machine was in the back of the plant away from the rest of the workers; that from April 21 to May 23 he was not assigned to work on any other machine; that sometimes another worker, usually Moore, would work with him on the machine; and that prior to April 21 he had worked on the machine but not between December 11, 1979, and April 21.[15] On cross-examination, Pierson testified that he was assigned to work on the Thermatron machine about 95 percent of the time after April 21; that he never worked on layout or patterns between April 21 and May 23; and that the Thermatron machines are in an open area in the plant 15 to 20 feet from the other areas of production.

Respondent introduced certain business records which show where each employee works each day and how many hours the employee spends at a particular function. (Resp. Exh. 15.) The exhibit shows that, on April 8, Pierson worked 3.5 hours on the dielectric machine, 2 hours in boxing, and 1.5 hours in maintenance; that on April 9 he worked 4 hours on the dielectric machine and 3 hours in boxing; that on April 15 he worked on the dielectric for 5 hours and 2 hours in maintenance; that on April 17 he worked 2 hours on the dielectric machine and 5 hours in maintenance; that on April 28, among other days, he worked on layout for the entire day; that on April 25 he worked on layout 1.5 hours; that on May 6–9 he worked on layout; that on May 13 he worked on the dielectric machine 3.5 hours and on layout 3.5 hours; that on May 9 he worked in maintenance for 3.5 hours; that on May 19 he worked in maintenance 6.5 hours; that on May 5 he worked on patterns for 7 hours; and that on May 6 he worked 3.5 hours in layout and 3.5 hours in miscellaneous patterns. Graham estimated that after April 21 Pierson worked on the Thermatron machine about 50 to 55 percent of the time.[16] Also, Graham pointed out that Respondent's business records show that Pierson worked on the Thermatron machine 6 hours on April 21 and, therefore, he was assigned to the machine before Graham saw him distributing cards.

At the end of the workday on April 29 Graham gave each employee the following letter:

> Thank you for calling the meeting yesterday to make us aware that you have real concerns about the proposed union representation—we share those concerns.
>
> We welcome the opportunity to participate in these discussions and we also see them as a way for us all to work out our mutual needs without the use of costly and possibly disruptive outside intervention. I don't know if we can satisfy everyone, but we are sure going to address the needs of the majority of you.
>
> Most of your suggestions and needs do not seem either unreasonable or unattainable if we all work together. Keeping the pleasant working conditions that you already seem to enjoy plus improving benefits is the real concern.
>
> Having indicated our opposition to Union representation, we are seriously working on the points you are interested in and we would like to schedule another productive meeting of all concerned for next week on Thursday, the 8th of May.
>
> We agree with those of you who said in the meeting that the Union was *not* necessary to gain your desired improvements!
>
> Feel free to let me know your thoughts!

Above R. George Brown, president, at the end of the letter appears the signature George. Brown testified, however, that he neither drafted nor signed the letter. Rather, Evans drafted the letter and paraphrased it over the phone in a conversation with Brown. Brown approved the action of Evans who, as indicated above, is a co-owner of the Company and was present at the above-described April 28 meeting.

Two days later, on May 1, Pierson was called into Graham's office and was given the following memorandum to read:

[12] Employees Pierson, Kevin Reilly, and Sandra Bica testified that Brown asked what were the employees' concerns. Lang testified that Brown said he wanted to discuss the employees' opinions. Brown's and Graham's assertions to the contrary cannot be credited in view of the overwhelming credible evidence that Brown wanted to know what the employees' concerns were.

[13] The employees mentioned such concerns as medical benefits, sick leave, holidays, pay raises, and safety in the plant. Pierson testified that Brown said, "I'll see what I can do." Brown denies saying this. Leader Lang testified that Brown said he would write down what they said and look into it but could not promise anything. Her version is credited, for Pierson's version is not corroborated and it seems highly unlikely that Brown would have made an unqualified statement even if the qualification "But I can't promise anything," as discussed *infra*, was, in this situation, meaningless.

[14] One of Respondent's leaders, Dennis Ostrowercha, testified that he gave an affidavit to a Board agent indicating that Brown also said, "and it [the Company] could afford to give the employees more." Ostrowercha further testified that Brown "didn't say he *would* give the employees more. He said he couldn't promise anything and had to be on neutral ground." (Emphasis supplied.) Brown did not specifically deny making this statement.

[15] The operation of this machine is described as repetitive, requiring no real skill, and little training. Two other employees, Reilly and Bica, testified that on a number of occasions they and other employees spent the entire day on one assignment such as the Thermatron machine.

[16] The records indicate that it was about 65 percent of the time.

ON 4-22-80 YOU WERE ISSUED A WRITTEN WARNING CONCERNING YOUR EXCESSIVE TARDINESS. SINCE THAT TIME, YOU HAVE BEEN TARDY ON 4-29, 4-30, AND 5-1-80. ONE MORE INCIDENT OF TARDINESS IN THE MONTH OF MAY WILL RESULT IN DISCIPLINARY ACTION UP TO AND INCLUDING DISCHARGE.

The memorandum was signed by Dennis Graham. Graham asked Pierson if he understood it. Pierson asked if he would be fired if he were 1 minute late in the month of May. Graham said yes. Pierson then asked if any other employee had been told he could not be 1 minute late in the month of May to which Graham replied that Pierson's case is an extreme one and "You can say all the bullshit you want. I think you know what it means." Graham did not deny this exchange.

The following letter was distributed to all employees on May 5:

> As I am sure you are aware, last week the union salesmen were at our door trying to get you to sign a union card, passing out their propaganda and holding meetings. Many of you have asked myself and others what you can do to keep out those outsiders. You can actually do a lot, and you have the same rights of expression that any other employee has.
>
> There is one way in which you can stop the union effort right now. That is simply to take a firm stand and refuse to sign any union card of any kind. With a strong united front, the outside union salesmen won't be able to find buyers for their bag of promises and will have to go look elsewhere for their monthly dues collections.
>
> More important, the card you may have been asked to sign may not be what it seems to be. The IAM salesman probably told you he only wanted you to sign a card in order to get an election. Take a good look at that card. Nowhere does it say it is only for an election. In fact, it really says you are signing a blank check over to these people; giving them the right to represent you without even having an opportunity to vote on what you want.
>
> Please be cautious and read carefully what you are asked to sign. If you sign a card just to go along or in order to have someone quit bothering you, or to get rid of someone, you may give up some important individual rights and have something forced on you that you don't want and find personally distasteful. Don't forget we are working together in a small informal operation and don't have all kinds of strict rules and regulations. Remember, you don't have to sign a card and give up your freedom. If anyone tries to scare you into signing a card or threatens your job security in any way, report it to Dennis, Larry or myself.
>
> Don't sign a card just to be friendly—think of yourself and your future. We don't want or need a union. We always have and will continue to deal with you individually on a fair and personal basis; to hear your problems and try to help you out whenever possible. The last thing we want to see is any bitter labor dispute. At this stage of our development we hardly need any more problems. It seems to me the only sure way to avoid the possibility of strikes and giving away your money to third parties in the form of dues and fees is to not sign these cards but rather tear them up, throw them out and insist people stop bothering you.
>
> I have always been open and honest with you and will be in the future. So there is no doubt about your company's position on this matter, I want to say it is our positive intention to oppose the union and prevent it from coming in here by every proper means. Plainly and simply, we do not believe a union will be in our best interest or your best interest.
>
> Let's have a good spring and summer and continue to work together as best we can for the benefit of all of us.[17]

The Union's petition to the Board for a certification of representative was also filed on May 5. And, Pierson gave his list of "SAFETY VIOLATIONS" (G.C. Exh. 11) to Graham for Brown. Apparently, all but about three of the items on Pierson's list were then remedied.

Three days later Brown held the meeting called for in the above-described April 29 letter. He met with employees 30 minutes before quitting time in the break area of the plant. Evans, Graham,[18] and the three leaders also attended. Seven witnesses testified about this meeting also, and again there was disagreement over exactly what was said. Pierson took notes at the meeting but he did not have them at the hearing herein. As Brown spoke he wrote on large pieces of paper (described as being 2 feet by 3 feet) and then taped the individual sheets on a pipe for the employees to see. According to Pierson, Brown made the following points, among others, during the presentation:

> The Union is an outsider.
>
> Those workers who are for the Union and those workers who aren't sure should be against the Union.
>
> Employees should ask the Union who are they and why are they interested in Vinyl-Fab.[19]
>
> The Union cannot determine employees' compensation. This is determined by the Company's ability and willingness to pay.
>
> Unions will not strengthen employees' jobs. With unions come rules in the form of policies and regulations. Employees would not be able to switch from one job to another.[20]

[17] The letter was signed by Brown and, while it apparently indicates his awareness of the wording of the authorization cards, it was not brought out on record how he gained this awareness.

[18] Graham testified that he had to load a truck to allow the employees to hear what Brown had to say. He was not there for all of the meeting and he did not recall what was discussed.

[19] Money was given as the reason; Reilly testified that Brown said that the Union wanted Vinyl-Fab employees' union dues.

[20] Bica testified that Brown said that everybody would stay on the same job. Reilly testified that Brown stated that if the Union came in the

Continued

Employees would have to pay union dues, and to work in the shop employees would have to be members of the Union.

With the Union, everyone's wages would be the same.[21]

The Union would not give job security. Brown cited strikes as an example. He said that most of the people in Detroit being laid off are union people, and that layoffs follow the union.[22] Bringing the Union in could close the plant.

The Union has demanded recognition. "They wanted to sit down with the Company and a third party to look over the cards to verify their validity and see if there was a majority then the Company would have to bargain with them, so we got over a potential pitfall by denying them the demand for recognition, and therefore to make sure the Union couldn't get in without a vote."

If an employee is discharged from the Union, then the employee loses his job because the employee couldn't work in the plant if the employee is not a member of the Union.

Employees should feel free to come to him directly with problems.

Leader Carol Skipper, who had not signed an authorization card, then asked "how do we get our cards back."[23] Brown told her to talk to Pierson. Leader Ostrowercha asked about an alternative union on the ballot. Brown responded, according to Pierson, "I really wish I could help you on that but I can't."[24] Brown then closed the meeting saying, according to Pierson, "I hope that we can come up with a way to answer or solve your concerns without the aggravation that management and that the workers would feel with a union."

Brown used an outline in making his presentation on May 8. It is attached hereto as Appendix A. [Omitted from publication.] He opened the meeting with a disclaimer that he could make no promises or threats but he had some opinions to express based on Respondent's position and his personal experiences. The Union was described as "outsiders" and it was indicated that the Company had a negative attitude regarding this outside influence. Based on his experience, Brown stated that unions ask for increased benefits and a strike is a vehicle that a union can use to enforce its demands. Brown also stated that the Union could not guarantee security—only the Company could—and that based on his experience working in a union at Massey-Ferguson and working with unionized shops at the Ford Motor Company and General Motors theres are more regimentation and rules to be followed in a union-shop environment. While he discussed the layoffs in the automotive industry, Brown vehemently denies that he said with unions come layoffs.[25] Also, Brown denies that he said that if the Union comes in the plant would close.[26] He did, however, discuss union shops and state that people who did not join the Union or who chose to withdraw from the Union could be removed from their positions in the Company. Also, he stated that if the Union were voted in everybody pays dues whether or not they voted. Brown testified that he did not ask employees what their complaints or problems were. Regarding the question of an independent union, Brown testified that Ostrowercha brought this up and Brown had no advice.[27] At one point in the meeting Brown told the employees that they could speak to him or Graham privately if they wished to talk about any question or concerns and did not want to speak out in front of a group. No one accepted the invitation.

Pierson's version of what was said at the May 8 meeting for the most part is supported by Brown's outline and is seriously challenged only to the extent that Pierson asserts that Brown said (1) layoffs follow the Union, and (2) bringing the Union in could close the plant.[28] Taking the latter first, both Brown and Ostrowercha denied that Brown made this statement. Pierson's version is not corroborated. In the circumstances, I credit Brown. On the other hand, regarding the former, Pierson's version is corroborated by two witnesses, although the corroboration can be characterized as weak.[29] Nei-

employees would lose some freedoms such as the Company's lenient attitude on absences and tardiness and, with the Union, employees might have job classifications.

[21] Bica also testified that Brown stated that everybody would get the same pay. Reilly testified that Brown stated that, if the Union got in, there might not be part-time employees.

[22] Reilly and Bica testified that Brown said "with unions come layoffs." Regarding the fact that Reilly's affidavit to a Board agent reads, "There was nothing specific said about layoffs if the Union came in," Reilly testified on cross-examination that he did not recall Brown's statement when he gave the affidavit in June 1980. Bica testified that her affidavit to a Board agent is incorrect where it states, "He [Brown] said something to the effect that when a union comes in layoffs follow" since she remembers Brown specifically saying, "when a union comes in layoffs follow."

[23] Reilly and Bica corroborated this testimony. Lang and Theresa Borowski had unsuccessfully demanded the return of their cards. At that time there were approximately 25 employees in the involved unit.

[24] Reilly testified that Brown responded that it was possible to get an independent union on the ballot and it was worth checking into. Bica thought that Brown first brought up the alternative union on the ballot.

[25] Lang and Ostrowercha testified that they did not recall Brown saying layoffs follow unions. Lang indicated that Brown stated that sometimes strikes follow unions and then he went on to tell about the layoffs at General Motors, Ford, and Chrysler. Lang also testified that Brown did not make any threats.

[26] Ostrowercha testified that Brown did not threaten to close the plant.

[27] Ostrowercha also indicates that he was the one who brought up the independent union at the May 8 meeting.

[28] Brown did not deny that he stated that working conditions would become stricter or harsher. Rather he stated that based on his experience with unionized shops "there was more regimentation and more rules to be followed in a union environment than we had in a rather flexible shop operation there." On cross-examination Brown testified that in a unionized shop there was "less flexibility than we had at that time in the plant." Also, he testified that at that time employees "had opportunities to move around the plant and change jobs on a four hour basis, and select their own duties for the day . . . ." and that when he used the term job flexibility this was the kind of thing he had in mind. Pierson's corroborated testimony that Brown stated that, if the Union got in, employees would not be able to switch from one job to another is, therefore, not denied and it is credited. Reilly's testimony that, if the Union got in, company policy regarding absences and tardiness would change and there might not be part-time employees was not specifically denied and it is credited.

[29] It is weak because Reilly did not include this in his affidavit to a Board agent and Bica, who indicates this is a direct quote, did not describe it as such in her above-described affidavit. Also she was wrong about who actually brought up the independent union at the May 8 meeting.

ther of the two witnesses supporting Brown's denial, however, unequivocally testified that he did not make the statement. Rather, both testified that they did not recall Brown making such a statement.[30] It would appear that Brown either made the statement or he, as indicated by his outline and Lang, wittingly or unwittingly discussed layoffs immediately after discussing strikes giving the impression intentionally or unintentionally to employees that layoffs and strikes follow a union.

With respect to the independent union, Brown testified that he told Ostrowercha during a private conversation that he did not want any union at all under any name. Ostrowercha testified that Brown, during the conversation, stated that he could not show any type of favoritism and could not give the answer Ostrowercha "was asking for."

By notice dated May 13 the Board notified Respondent and the Union that a representation hearing would be held on May 27.

On May 20 Ostrowercha began passing out authorization cards for the Vinyl-Fab Employee Group and circulated an article to the employees dealing with independent employee unions. All three leaders signed these authorization cards. Additionally, six employees signed. Ostrowercha calculated that about 75 percent of the employees supported the Machinists. He did not tell Graham or anyone else in management who by name supported the Machinists but he did discuss with Graham the fact that the Machinists had a majority and "it looks like the Union may get in." While Graham recalled having discussions with Ostrowercha in May regarding the Machinists organizing drive, he testified that he did not recall discussing whether or not the Machinists had a majority at that time, and Ostrowercha never mentioned to him the specific names of any employees who supported the Machinists.

On May 22 Pierson saw Ostrowercha use the phone in Graham's office to obtain information on independent unions, specifically on how they could be placed on the ballot. Graham was present but did not say anything. Pierson did not know if Ostrowercha was on a break. Ostrowercha testified that he did not ask Graham's permission to use the phone, that he did not think Graham was in the office at the time, that Pierson did come into Graham's office, that he was on a break at the time, that anyone could use the phone in Graham's office, and that he used the phone in Graham's office because another employee was using his phone. Graham testified that he walked into his office on May 22 and saw Ostrowercha, who was facing the wall, using the telephone. Pierson walked into the office at that time. Graham overheard Ostrowercha ask questions about independent unions. Graham then left the office. He asserts that he did not tell Ostrowercha to make the phone call, and that employees are allowed to use his phone without asking permission.

The day before, the Union sent a letter to Brown advising him that Pierson would be absent May 27 to attend the above-described Board hearing.

On May 23 Respondent laid off nine employees, including Pierson, Reilly, and Bica. Graham advised Pierson that, while it was supposed to be the peak season, Respondent's product was not moving, credit was hard to get, and people were not buying swimming pools so they were not buying covers. Pierson was told that the layoff was permanent,[31] but that it was Respondent's policy to call back laid-off employees before hiring new workers, and that the employees were chosen on a seniority basis with one exception, which was made for outstanding work quality. Prior to May 23 Pierson had never been informed by any of his supervisors that there might be a layoff. Similarly, Bica was not forewarned. She did not recall whether Graham advised her that it would be a temporary or permanent layoff. Reilly was advised that the employees would be called back on the basis of their work performance and not seniority. These three employees, among others, were recalled in September 1980 and laid off again in October 1980. None of the three has worked for Respondent since.

As president of Respondent, Brown receives sales forecasts. The one for fiscal 1980 (May 1 to April 30) estimated that Respondent would sell 8,000 units out of its Livonia plant as compared to the 6,197 units sold in fiscal 1979. At the time of the above-described April 28 meeting, Respondent was operating according to the forecast. However, during May 1980, Respondent's Livonia plant sales dropped off so that by the end of May not only were they below the forecast but they were less than they were by the end of May 1979. The pattern continued and Respondent did $375,000 less in business in 1980 than in 1979. Brown first learned of the downturn while reviewing weekly sales reports in May 1980. In May 1979 Respondent had sales of $289,966. It was anticipated that Respondent would have orders in the area of $330,000 in May 1980. Respondent's sales report for the period May 5 through May 9 showed total billing for the month to date of $47,855 while it was anticipated that the sales would have been double that figure. One week later Brown expected sales of $175,000. But Respondent's billing for the month to date on May 16 was $69,851. Trade journals published in May pointed out that the recession was having a marked effect on activity in the swimming pool industry. (Resp. Exh. 9, p. 8.) Additionally, Respondent lost three large customers. In view of this, Brown reviewed inventory data. He then asked Graham on May 19 to take a physical inventory and to determine how much production time or man-hours would be required to make enough units to ship what Respondent had shipped in 1979. It was estimated that from a man-hour standpoint Respondent could do it with half as many people as it then employed, which was

[30] As indicated above, Lang testified that Brown did not make any threats. But to hold, as Respondent apparently does on brief, that this means that Brown did not say layoffs follow unions requires a determination that the witness drew a legal conclusion which was not, in my opinion, the case. And, if she did, it leaves unexplained why she responded, "Not that I recall" to the question, "Did . . . [Brown] ever say that layoffs follow unions?" If the legal conclusion were made that Brown did not make any threats, then the witness would have replied, "No." Undoubtedly, when Lang testified that Brown did not make any threats she was testifying to those which would be obvious to a lay person.

[31] Graham did not recall whether anyone advised him that he should make sure it was clear to each employee that it was a permanent layoff.

27 including part-timers.[32] Taking attrition into consideration, Brown decided to lay off nine employees.[33] The nine were chosen on the basis of seniority with two exceptions, namely, Cathy Wilson (previously Cathy Fern), who is a skilled sewer, and Gilbert Guzman, who was a skilled journeyman electrician.[34] When Brown requested Graham to make the man-hour study, Graham determined that he would need approximately three sewing machines running for the rest of the year. He estimated that to meet production needs he would require 13 or 14 people but decided to retain 18 to make sure that he would have enough employees. The decision not to lay off Cathy Wilson was based on Respondent's need for people with sewing skills. Sewers were taken off the machine after 4 hours and Graham indicated that he needed as many sewers as possible. Respondent had laid off employees at times since 1967 but it did not have any layoffs in 1980 prior to May 23.

After May 23 Respondent hired two people. One was a supervisor to work under Graham. The other was an electrician hired to do maintenance work and replace Guzman, who had died. The electrician was hired instead of recalling Pierson because Respondent had plans to install new machines and, while Pierson did some electrical work, Graham did not believe he was able to completely wire the new machinery. At the time of the hearing herein, Respondent employed eight or nine people. At no time between May 23 and the hearing did it ever employ more than approximately 15 people.

Before and after the May 1980 layoffs, Respondent attempted to increase its sales. A consulting firm was brought in to deal with the job satisfaction, personnel training, market evaluations, and market placement. Respondent increased its advertising efforts, and between March and the end of 1980 it increased its advertising expenditures from about $50,000 a year to $200,000 a year. Notwithstanding its efforts, however, Respondent's 1980 sales at its Michigan plant were $300,000 below its 1979 sales. Production was cut back to 4 days a week and Respondent suffered a loss at its Michigan facility in 1980.

As indicated above, the Union filed charges against Respondent on May 27 alleging unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act based on the May 23 layoff which assertedly occurred because of the employees' support of the Union. The charge was amended on July 7 to additionally cover (1) Respondent's alleged refusal to bargain with the Charging Party in violation of Section 8(a)(5) of the Act, (2) the allegation that Respondent has attempted to destroy the Charging Party's majority status and make impossible the holding of a fair election, and (3) the allegation that Respondent violated Section 8(a)(2) by its formation and domination of an employee union.

B. *The 8(a)(2) Charge*

Regarding the charge that Respondent formed and dominated the Vinyl-Fab Employee Group, Leader Ostrowercha testified as follows:

(1) That his wife wrote away for an article on independent unions in February 1980.[35]

(2) That he drew the form of authorization card to have the Employee Group placed on the ballot[36] and passed them out to employees 2 or 3 weeks after the Machinists began to organize. [G.C. Exhs. 16, 22, and 25(a) through (g).]

(3) That employees returned the authorization cards to him and to Lang.[37]

(4) That later the employees dated the authorization cards.

(5) That he then mailed the dated authorization cards to the Board.

(6) That he chose the name of the Group.

(7) That neither he nor anyone else drew up a constitution or bylaws for the Group.

(8) That the Group has no officers.

(9) That the employees questioned Ostrowercha whether it was proper for him to engage in union activity in view of the fact that he is a Canadian working on a resident-alien visa.

(10) That the Group dissolved over a period of time.

(11) That he did not consider himself to be a supervisor at the time he attempted to establish an independent-type union.

(12) That no one in management told him to try to set up the independent-type union.

(13) That no one in management helped him in any way with the independent-type union.

III. SUPERVISORY ISSUES

A. *The Evidence*

The leader position was created at Respondent's Livonia plant in 1979 for Lang and Skipper, and it was expanded in February 1980 to include Ostrowercha.[38] After Graham started as plant manager, he intended for the leaders to take a leadership position. But, according

[32] Respondent had four part-timers, *viz*, maintenance man Gilbert Guzman, Virginia Guzman, and sewers Sue Gwilt and Allena Micholson.

[33] Brown did not normally involve himself in decisions to lay off employees. He indicated on cross-examination that one of the reasons he became involved in May 1980 was because of the Machinists. Brown testified that to his knowledge part-timers were not usually laid off before full-timers in the past but he pointed out that in layoffs prior to the layoff of five employees in November 1979 almost all employees were part-time workers.

[34] Only one of the nine employees laid off had more seniority than Pierson. The two other part-timers who were not laid off, Micholson and Gwilt, both had more seniority than those laid off.

[35] Why Ostrowercha would have wanted to obtain such an article in February 1980 when the Machinists did not begin to openly organize until April was not clarified. It is noted that Ostrowercha originally testified that he began regularly opening the plant in February 1980 and then changed his testimony regarding the time to May or June 1980. It would appear that Ostrowercha's recollection of the timing of events is not that reliable.

[36] The form states, "I , As [sic] a production or maintenance employee of Vinyl-Fab industries wish to see a representative group called the Vinyl-Fab Employee Group, put on the ballet [sic] as an alternative to the International Association of Machinists."

[37] Lang testified that she did not know why employees gave the forms to her but she gave them to Ostrowercha.

[38] When the leader program was first established leaders were given a 40-cent-an-hour raise. Ostrowercha did not receive a raise when he became a leader. He was making more money than other employees but he indicated that this was because of his shipping and receiving job. He did not ask for a raise when be became a leader.

to Graham, the employees did not respect the leaders sufficiently to allow this to occur, and by the end of March 1980 the three ceased being leaders.[39] Graham still used them as "channels of information" but he asserted that all employees recognized him as the supervisory authority and no one else.[40]

By memorandum dated March 7 to all employees, Graham explained the authority and responsibilities of the three leaders who are, as he referred to them in the memorandum, "supervisors." A copy is attached hereto as Appendix B. [Omitted from publication.] Briefly, Graham advised the employees that any problem should be brought to the leaders' attention, and then, if necessary, to him; that the leaders played a role in determining each individual's performance evaluation; and that leaders would be in charge of personal relief time.

With respect to the authority and responsibilities of the leaders, Graham testified as follows:

(1) They do not have authority to hire or interview applicants for employment.

(2) They do manual labor about 95 percent of the time.[41]

(3) They report to him, discuss production, and convey instructions to the employees.

(4) He assigns work at the beginning of the shift and after lunch and leaders and employees decide where employees will work.

(5) They do not assign work.

(6) They cannot transfer employees from one department to another but he does.

(7) They do not have authority to lay off employees or recall employees from layoff but he does.

(8) Regarding employee evaluations, Graham asks leaders for input but he makes the actual evaluation.

(9) They do not have authority to reprimand, discipline, suspend, or discharge employees but he does.

(10) They do have authority to advise employees regarding deficient performance.

(11) They do not maintain employees' timecards or report for excused absences or tardiness.

(12) They have authority to permit employees to leave work only in Graham's absence.

(13) They do not maintain any type of employee personnel record but he does.

(14) They cannot adjust the employees' complaints but he can.

(15) They punch the timeclock.

(16) They are paid overtime.[42]

(17) They did not receive any benefits during April and May 1980 that other employees did not receive.

(18) They take breaks.

(19) They, like most other employees, received bonuses at Christmas 1979.

(20) They receive vacations on the same basis as other employees.

During the last week in February, Graham was absent from the plant and the leaders were left in charge. Also, occasionally, Graham was away from the plant for an hour or so and the leaders were placed in charge. Graham left written instructions.

In describing her duties as leader, Lang testified that she was responsible for making sure sewers had materials to work with and their machines operated; that she would sometimes help the sewers and sometimes sew herself; that she would work in boxing; that she and other leaders would meet with Graham and discuss employee problems, employee speed, and the quality of employees' work; that she did not keep track of the attendance or tardiness of sewers; that while she was a group leader Graham left the plant for a week and before going advised the leaders that they could fire employees while he was gone; that Graham advised the employees that in his absence the three leaders would be in charge and could fire employees; that when Graham was away from the plant one of the employees requested to be allowed to leave and she gave the employee permission; that she permitted sewers to switch jobs only when Graham was not around; that Graham once told her she could discipline employees but she did not like to discipline people; that Graham never asked her opinion and she never offered it on whether an employee should get a raise; that Graham never asked her to help with an evaluation of an employee; that she never recommended that someone be hired or fired; that only in Graham's absence would she determine who would be sewing each day; that she referred employee conflicts to Graham; that she received the same fringe benefits as other employees; that she punched a timeclock the same as other employees; and that she got paid for overtime.

Ostrowercha's testimony regarding the authority and responsibilities of leaders did not differ in any material respect from that given by Lang. He did indicate that, when Graham told him he could fire employees while Graham was absent in February 1980, he was advised that any exercising of that authority was subject to Graham's review upon his return. Graham, however, did not advise the employees of this qualification. While he was leader, Ostrowercha spent about 95 percent of his time doing manual labor. He, along with the owners, Graham, and some of the secretaries, has keys to the plant, and he unlocked the plant while Graham was absent in February 1980. Also he has opened the plant since May or June 1980 when the starting time was changed from 8 to 7 a.m.

How did the employees view the leaders? Pierson viewed the three leaders as supervisors. He testified that in the first week in April he went to Graham with a problem the specific nature of which he did not recall. Graham assertedly advised Pierson "that . . . [he] was to take . . . [his] problem, start taking . . . [his] problems directly to Dennis Ostrowercha, the group leader, and then if there were problems, that if I wanted to then I

[39] Specifically, Graham pointed out that Lang would allow people to stand around in her area and not say anything to them or tell him. Ostrowercha was ignored when he signaled the end of breaks and assigned tasks. Lang testified that once in a while she would report employees to Graham for standing around.

[40] Brown testified that he did not consider Lang or Ostrowercha to be a supervisor.

[41] This compares to Graham doing manual labor about 25 percent of the time.

[42] Unlike the leaders, Graham is not paid overtime and he does not punch a timeclock.

could come to him, but I was to go to Dennis Ostrowercha." On cross-examination Pierson testified that Lang and Ostrowercha did not hire, that he did not know of any instance where they recommended that an employee be fired or get a raise, that they did not discipline, that he did not know of any instance where they denied an employee's request to leave early, and that Graham would tell him what job to perform. Reilly also considered Ostrowercha to be part of management. But on cross-examination he testified that Graham usually told him what job to perform and when Ostrowercha assigned a job he said "Graham told me to do it," that if he wanted to switch jobs Graham had to approve the change, and that when he wanted to go home early he asked Graham not Ostrowercha. With respect to leader Skipper, Bica testified that she did not know until 2 weeks after she began working at Vinyl-Fab (she began on March 17) that Skipper was a leader. She assumed that Skipper was just a relief person. No one ever advised Bica that Skipper was her supervisor. If Bica wanted to take time off she would ask Graham. Bica did not believe that Skipper had authority to recommend people for pay increases.

B. *Analysis*

The General Counsel argues that the leaders were supervisors because they were empowered by Respondent with supervisory authority which has never been withdrawn, and they exercised authority indicative of their supervisory status. On the other hand, Respondent points out that the above-described March 7 memorandum was part of Graham's attempt to make the leaders into supervisors but that Graham did not succeed and the leaders never actually possessed supervisory authority. Assertedly the sporadic, irregular, and isolated instances in which leaders were left in charge of the plant in Graham's absence cannot support a finding of supervisory status.

Viewing the record as a whole, it is my opinion that the leaders were not at all times material herein supervisors within the meaning of Section 2(11) of the Act. The leaders were generally no more than liaisons between Graham and the employees, and, except in Graham's absence, did not exercise independent judgment. They did not acquire supervisory status because they temporarily assumed Graham's duties in his absence. *Stewart & Stevenson Services, Inc.*, 164 NLRB 741 (1967); and *Frederick Steel Company*, 149 NLRB 5 (1964).

IV. DISCUSSION AND CONCLUSIONS

It is my opinion that a bargaining order is necessary and appropriate. The Union's majority by cards has been established and the nature and extent of Respondent's unfair labor practices, as discussed *infra*, make it unlikely that a fair election could be held.

Paragraph 10(a) of the complaint alleges that, on or about April 21, Respondent, by its agent, Graham, threatened employees by stating that Respondent would impose more onerous working conditions on employees, and that employees could lose their jobs if the Charging Party's organizational campaign were successful. The evidence regarding statements made by Graham on April 21 relates to his above-described conversation with one employee, *viz*, Pierson, sometime after Graham stated that he thought "that unions are doing more harm than good in society." The General Counsel argues that Graham's statement about work rules, automation, and part-time employment and about the work habits of some of Respondent's employees and whether they could survive in a union environment were none too subtle threats. Respondent, citing *N.L.R.B.* v. *Gissel Packing Co., Inc.*, 395 U.S. 575 at 618 (1969); *Laborers' District Council of Georgia and South Carolina* [*Southern Frayer Foods, Inc.*] v. *N.L.R.B.*, 501 F.2d 868 (D.C. Cir. 1974), *Island Holiday, Ltd., d/b/a/ Coco Palms Resort Hotel*, 208 NLRB 966 (1974), *Birdsall Construction Company*, 198 NLRB 163 (1972), and *Garden City Fan*, 196 NLRB 777 (1972), argues that Graham made no threats or promises, and that his observations were based on objective facts. As indicated in Laborers' District Council of Georgia and South Carolina, supra at 874:

> It is well established that an employer has a right to express his opinions and to predict unfavorable consequences which he believes may result from union representation. Such predictions or opinions will not violate the Act if they have some reasonable basis in fact and are in fact predictions or opinions and not veiled threats of employer retaliation.

The Supreme Court in *Gissel Packing Co., supra* at 617–619, set forth the following standards to be used in determining whether an employer's statements are lawful:

> But we do note that an employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the Board. Thus, § 8(c) (29 U.S.C. § 158(c)) merely implements the First Amendment by requiring the expression of "any views, argument, or opinions" shall not be "evidence of an unfair labor practice," so long as such expression contains "no threat of reprisal or force or promise of benefit" in violation of § 8(a)(1).
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> * * * * *
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> Thus, an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a "threat of reprisal or force or promise of benefit." He may even make a prediction as to the precise effects he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to the demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization. . . . If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available

> facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment. . . . [A]n employer is free only to tell "what he reasonably believes will be the likely economic consequences of unionization that are outside his control," and not "threats of economic reprisal to be taken solely on his own volition."

While Graham indicated that he was stating his personal views, such qualification was meaningless in the circumstances present here. The purpose of the plant manager's statements made in his office in the plant was to dissuade Pierson from taking actions which would affect the Company and its employees. Consequently, Graham's statements were company statements. And certain of the statements were not based on objective fact to convey a belief as to demonstrably probable consequences beyond the Comany's control. Graham indicates that he was referring to his experience with the Ford Motor Company in stating to Pierson (1) that some of Respondent's employees with their records and current work habits would not be able to be employed in the union environment he knew, (2) that, regarding the stricter working conditions being imposed if the Union were successful, it was his observation that job comfort in the union environment he knew was very, very low, and (3) that hiring of part-time workers is not encouraged by unions. While this may be Graham's perception of the conditions at Ford Motor Company, it does not constitute the demonstrable, probable consequences of unionization of Respondent. And certainly work rules, working conditions, and the use of part-time employees are not matters which are totally beyond the Company's control. These statements are thinly veiled unlawful threats which contravene provisions of the Act.[43] *Montgomery Ward & Co., Incorporated*, 253 NLRB 196 (1980); and *GE's Trucking, Inc.*, 252 NLRB 947 (1980). Cases cited in Respondent's brief are distinguishable.[44]

In paragraph 10(b) of the complaint it is alleged that, on or about April 22 and May 1, Respondent by its agent Graham threatened to discharge an employee because of the employee's union activity. On brief, the General Counsel argues that prior to April 22 Pierson's tardiness record apparently was not deemed of sufficient concern to warrant a written warning. Regarding the May 1 written warning to Pierson, the General Counsel points out that, although Respondent does not dock an employee's pay until he is more than 7 minutes late, Pierson was told he would be fired for being 1 minute late, and that Pierson in March was told that tardiness would not affect a pay raise. Respondent points out that Pierson's tardiness was admittedly the worst of any employee at the plant, that Graham advised Pierson in March or early April 1980 that he could stay if he worked in production and Graham also advised Pierson that his tardiness would have to improve, that when it did not improve Graham issued the written warning, and that even after the May 1 warning Graham excused Pierson's tardiness when Pierson provided advanced notice and a legitimate excuse. As indicated by General Counsel's Exhibit 10, Pierson had been tardy on numerous occasions since January. Yet Graham waited until Tuesday, April 22, the date after Pierson openly began to organize, to give him a written warning. Why? Graham indicated that previously Pierson did maintenance work. Yet, according to Respondent's Exhibit 15, Pierson spent a great deal of his time doing maintenance work through Friday, April 18, the last day of the study and the last working day before Pierson began to pass out authorization cards. The timing of the April 22 warning, Graham's antiunion statement, and the failure of Graham to render a logical explanation for his delay in issuing the written warning convince me that the April 22 warning was actually a thinly veiled threat directed at Pierson's union activity, and the followup May 1 warning, in the circumstances, falls into the same category.

Paragraph 10(c) of the complaint alleges that, in or about late April, Respondent by its agent Lang stated that, if the Charging Party's organizing drive were successful, then more onerous working conditions would result and that imposition of such conditions would make it impossible for certain employees to remain employed by Respondent. In view of the fact that Lang's testimony that she never made this statement is credited, paragraph 10(c) of the complaint is dismissed.

One paragraph of the complaint will be taken out of order so that the related matters in paragraphs 10(d) and (f) can be treated together. Nonsupervisor Lang's denial of the allegation in paragraph 10(e) of the complaint is credited. Accordingly, this portion of the complaint, which asserts that on or about late April she, as agent of Respondent, stated that Respondent's plant would close if the Charging Party's organizing drive were successful is dismissed.

It is alleged in paragraph 10(d) of the complaint that on or about April 28 Respondent by its agent Brown at a meeting for all employees solicited employees' complaints and impliedly promised to remedy said complaints, all for the purpose of blunting the Charging Party's organizational campaign. Respondent, on brief, argues that the testimony of Graham and Lang that employees sought the meeting is not contradicted; that

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[43] Graham's other statements are, in my opinion, protected by Sec. 8(c) of the Act.

[44] In *Coco Palms Resort Hotel, supra*, respondent therein merely attempted to compare the union conditions at Coco Palms with those at respondent's hotels which already operated under a bargaining agreement with the involved union. The statements were made in a noncoercive atmosphere and in the absence of other unfair labor practices. In *Birdsall Construction Co., supra*, the Board determined that speeches of the respondent therein amounted to nothing more than an objective statement of financial problems which it would face in the event of unionization, followed by the prediction that such problems could make relocation of its business about 65 miles from the present site an economic necessity. But, the Board pointed out, there was no question that employees could not continue their employment at the new site. In *Garden City Fan, supra*, which dealt with a petition filed by a union objecting to conduct which allegedly affected an election, the Board determined with the respect to alleged conversations and remarks that either it was not established that they occurred, or they did not occur during the critical period, or the election atmosphere was not so disrupted by the alleged remarks as to preclude the employees from exercising a free choice on the question of whether or not they wished to be represented by the union, or that the alleged observations made to a single employee out of a unit of 73 employees were too isolated and innocuous to warrant setting aside the election.

Brown specifically indicated that he could make no promises; that the record fails to establish that Brown solicited grievances; and that, even if it is determined that grievances were solicited, in view of Respondent's past practice, no violation of the Act occurred.[45] It appears that, at the behest of Brown, employee concerns regarding benefits, leave, holidays, and safety were discussed at the April 28 meeting. Brown noted these concerns on a pad and told the employees that he would look into them but he could not promise anything. Brown solicited complaints. But a violation of the Act occurs only with the promise either implicit or explicit to act on the complaints inasmuch as the solicitation itself is not a violation. *Uarco Incorporated*, 216 NLRB 1 (1974). Since Brown at this time did not explicitly promise to act on these complaints was there an implied promise notwithstanding his disclaimer? It has been determined that where an employer has a practice of soliciting employee complaints it will not be inferred that by soliciting complaints during an organizing campaign the employer is implicitly promising to correct the complaints. *Reliance Electric Company*, 191 NLRB 94 (1971). While Respondent's plant manager may have sought suggestions from employees and while a survey regarding employees' job satisfaction was conducted before the organizing campaign started, such efforts do not compare in magnitude to having employees meet with the president and two other officers of the Company. Respondent does not assert that such meetings were commonplace or, for that matter, were held before. Employees would logically anticipate that the fact that the president of the Company solicited their concerns and noted them on a pad would mean that conditions would improve. It is unlikely that their anticipation would be dispelled by the president's statement that he could make no promises after he stated that he did not know what he could or could not say. It would seem that employees would view such remarks as little more than doubletalk, and that in fact Brown, being president of the Company, would do what he could to make union representation unnecessary. Compare *Montgomery Ward & Co., Incorporated*, 228 NLRB 750, 756 (1977). This view would be confirmed by Respondent's letter of April 29 to the employees.

Paragraph 10(f) of the complaint alleges that Respondent, by its agent Brown, through a letter given to all employees solicited employees' complaints and promised to remedy said complaints, all for the purpose of blunting the Charging Party's organizing campaign. The letter, quoted above, speaks for itself. It was distributed to all employees. Its paraphrased highlights are: Respondent opposes the Union, Respondent will address the needs of the majority of employees, most of the employees' suggestions and needs expressed on April 28 are reasonable and attainable "if we all work together," and "you do not need the Union" to obtain improvement. Respondent argues that the letter contains language which, if taken out of context, possibly could be construed as an improper solicitation of employee concerns and a promise of better working conditions; that the significance of the letter is minimized by Respondent's past practice of seeking to discover and remedy job-connected concerns; that Brown repeatedly informed the employees verbally that he could make no promises, "thus clarifying any ambiguity the letter may have engendered"; and that the letter clearly constitutes at most an isolated and *de minimis* violation of the Act which does not warrant remedial action by the Board.[46] While Respondent argues that Brown readily assured employees that he could not make any promises, his actions both at the April 28 meeting and subsequent thereto belied this assurance. Evans, the drafter of the April 29 letter, and an officer and coowner of the Company, was present at the April 28 meeting. His April 29 letter memoralizes the Company's position. If it did not, it could have been explained, repudiated, and revoked at the May 8 meeting by either Brown or Evans. Both were present. But nothing was said about the letter at the later meeting. While Brown again said he could make no promises, this did not clear up any ambiguity. In fact, Brown never spoke to the ambiguity for none existed. The employees had it in writing from the Company—the majority of their expressed concerns would be taken care of without bringing in the Union.

In paragraph 10(g) of the complaint, it is alleged that on or about May 8 Respondent by its agent Brown at a meeting for all employees threatened employees by stating that it would implement more onerous working conditions, stricter work rules, and layoffs of employees if the Union's organizing campaign were successful.[47] And in paragraph 10(h) of the complaint it is alleged that Brown during the same meeting solicited employees' complaints for the purpose of blunting the Charging Party's organizing campaign. Quoting *Gissel Packing Co., supra*, Respondent argues that Brown's May 8 speech did nothing more than permissibly and legally "communicate to his employees his general views about unionism [and predict] the precise effects [he believed] organization will have on his company [based on his belief] as to demonstrably probable consequences beyond his control." The speech contained threats of retaliation and an implied promise of benefit. Brown advised the employees that, if the Union succeeded, company policy would be changed regarding job switching, absences, tardiness, and part-time employees. The standard set out by the Supreme Court in *Gissel Packing Co., supra*, for determining whether an employer's statements are lawful is described above. Brown's experience in a union at Massey-Ferguson and working with unionized shops at Ford Motor Company and General Motors does not constitute the

[45] It is pointed out by Respondent that from the time Graham became plant manager he held meetings with the employees and he solicited suggestions on how he could improve the job environment. Also, in March 1980, a survey was distributed to employees soliciting their comments on their jobs and the Company.

[46] Respondent also points out that it has already voluntarily posted a notice to reassure its employees that it will not in the future solicit employee complaints or promise to remedy them for the purpose of thwarting their protected concerted activities (see Resp. Exh. 13), and that Brown forthrightly admitted that he regretted authorizing Evans to sign his name and distribute the letter to employees.

[47] The General Counsel also points out that during this meeting Brown falsely informed the employees that an employee expelled from the Union for attempting to decertify the Union in the future would lose his job.

demonstrably probable consequences of the unionization of Respondent. And, as indicated above, work rules, working conditions, and the use of part-time employees are not matters which are totally beyond the Company's control. Brown's statements were unlawful threats. *Montgomery Ward & Co., Incorporated*, 253 NLRB 196 (1980); and *GE's Trucking, Inc., supra*. Brown also either specifically stated or implied that with unions come layoffs. On May 8 there was no known economic necessity for a layoff and Brown's suggestion, therefore, meant he could take this action solely on his own initiative. Consequently the statement can only be characterized as a threat. At the May 8 meeting again Brown solicited complaints. Both his outline and the testimony indicate that he advised employees that they could come to him or Graham individually and privately with their questions and concerns. Notwithstanding the fact that at the beginning of the meeting Brown said he could make no promises, the April 29 letter gave the official written policy of the Company, *viz*, that it would entertain suggestions and improve benefits, and all of this could be accomplished without outside intervention.[48]

It is alleged in paragraph 10(i) of the complaint that in or about early May Respondent remedied employee complaints concerning safety problems in the plant for the purpose of blunting the Charging Party's organizing drive. Respondent points out that just as it did before the Union's campaign the Company corrected one out of five of Pierson's safety complaints. While there seems to be a question of exactly how many of the safety complaints were remedied, it appears that Respondent did not remedy all of them. The Company in the past did remedy some safety complaints and it has not been demonstrated that it departed from past practice. Accordingly, paragraph 10(i) is dismissed.

Paragraphs 11(a) and (b) of the complaint allege that Respondent dominated, controlled, and rendered unlawful aid and assistance and support to the Vinyl-Fab Employee Group in that Respondent's alleged agents Lang and Ostrowercha formed and led this group. It has been determined that Lang and Ostrowercha were not supervisors under the Act and they have not otherwise been shown to be agents of Respondent. Also, it has not been demonstrated that Respondent dominated, controlled, or rendered unlawful aid and assistance and support to the Vinyl-Fab Employee Group. Ostrowercha's phone call was made during a break and all employees are allowed to use Graham's phone without prior permission. In the circumstances, paragraphs 11(a) and (b) of the complaint are dismissed.

In paragraphs 12(a) and (b) it is alleged that from on or about April 21 to on or about May 23 Respondent by its agent Graham assigned Pierson and Moore to work together on one of its production machines and did not offer said employees the same opportunities to perform other tasks as it offered other employees, and that this occurred as a result of their activities on behalf of and sympathy for the Charging Party. In view of the fact that Respondent's unrefuted business records show that both of these employees did perform other tasks during the above-described period, and since it was not demonstrated that they had less of an opportunity than other employees to switch—or even if that were the case that this was the result of their union activity *vis-a-vis* their skills—paragraphs 12(a) and (b) of the complaint are dismissed.

It is alleged in paragraphs 13(a) and (b) and 14(a), (b), and (c) that on or about May 23 Graham permanently laid off nine specified employees including Pierson and William Fern to make Pierson's discriminatory layoff appear lawful, and that Respondent did this because of the employees' membership in, activities on behalf of, or sympathies for the Charging Party and/or as reprisal for certain employees engaging in activities on behalf of the Charging Party. On brief, the General Counsel argues that up to May 1980 Respondent's sales performance, even with the pause that occurred in January, exceeded Respondent's sales forecast; that, in May 1980, there was a slight stall in Respondent's business, a stall that was lesser in degree than had occurred in January 1980; that after receipt of only one-half a month's data Respondent precipitously laid off nine employees; that when similar or even more severe lags in sales occurred in March, June, and August 1979 no layoffs took place; that as of mid-May sales were at least on par with 1979 when no layoffs occurred until late in the year; that, during these prior similar periods, employees were hired or recalled from layoff and not laid off; that the inference is warranted that the intent of the layoff was to cut the heart out of the organizing effort, and to preclude those laid off from voting in any future Board elections;[49] that the layoff occurred just a few days before a scheduled Board representation hearing; and that Respondent knew or had reason to believe that seven of the nine persons *laid off* were union supporters since Ostrowercha allegedly admitted to this. With respect to the selection process of those laid off, the General Counsel argues that it appears that Respondent engaged in a calculated effort to lay off as many union supporters as possible, particularly the leader Pierson, and still be able to deny that this was the true intent. Regarding Cathy Wilson, one of the exceptions to the layoff by seniority, the General Counsel points out that this individual was retained allegedly because of her quality of performance as a sewer but assertedly Respondent needed only 6 sewers (2 for each of the 3 sewing machines) and not the 11 it retained. The General Counsel then argues that if the five unnecessary sewers had been laid off others could have been retained, but "that obviously would not be within . . . [Respondent's] purposes." Respondent points out that its business is cyclical and production and sales in early 1980 cannot be compared to production and sales in May 1980 since sales in May should have exceeded the total sales for the

[48] That no employee met with management pursuant to this invitation is irrelevant. Additionally, a portion of Brown's presentation was not accurate in that Brown misrepresented to the employees "that people who did not join the Union, or who chose to withdraw from the Union involvement could be removed from their position in the Company." Such a misrepresentation, even if unintentional, is without the protection of the first amendment and unlawful.

[49] The General Counsel points out on brief that Respondent hoped that if found to be permanent layoffs those laid off would not be eligible to vote in the Board election.

previous 4 months. They did not, and Respondent had to revise its forecast and act accordingly. With respect to 1979, Respondent points out that because of the high turnover rate of employees in that year (65 people quit or were terminated, including 5 who were laid off as compared to 1980 when 24 people quit or were terminated, including the 9 who were laid off—see Resp. Exh. 11) it was not necessary to lay off people until November 1979. Respondent argues that sewers are more versatile employees than people like Pierson and Fern who have limited skills. Finally, Respondent argues that the essentially uncontradicted evidence shows that the May 23 layoff occurred because of an unprecedented decline in sales, and that the employees' union activities at the time of the layoff did not insulate them from economic realities anymore than it would have insulated Respondent.

In view of the fact that so many of the employees had signed authorization cards it would have been impossible to have a layoff of a sizable number of employees which did not affect union supporters. Ostrowercha, who was not a supervisor, testified that he never told anyone in management the specific identity of those who supported the Union. With respect to the approach used by Respondent to decide who to lay off, if Cathy Wilson, a union supporter, had been laid off and William Fern, a union supporter, had been retained this would not have helped Pierson. It would have made Pierson the last employee to be laid off in terms of seniority, and then the question of whether the number chosen was in some way calculated with Pierson's union activity in mind would have been inevitable. But to retain Pierson, Respondent would have had to decide not to make the other exception; namely, Gilbert Guzman who was an experienced skilled maintenance man. Pierson was Guzman's helper. This exception to the seniority approach is understandable and the General Counsel does not argue this point. He does, however, argue that if five unnecessary sewers had been laid off others could have been retained. It is noted that every one of the 11 sewers signed authorization cards for the Union.

Because of the timing of the layoff it is understandable how one could suspect that it was unlawfully motivated. The General Counsel, however, has not refuted Respondent's showing that the layoff was economically motivated. It has not been established that the layoff itself was a pretext to undermine union support by putting seven union supporters, including union activist Pierson, on permanent layoff. Those laid off were not discriminatorily selected. Indeed, other than Pierson it has not been demonstrated that management knew for sure exactly who of those laid off supported the Union.[50] The ratio of union supporters laid off, 77 percent of those laid off were union supporters, is exactly the same as the ratio of union supporters at the plant before Lang and Borowski requested their cards back (21 or 27 employees signed authorization cards). Those laid off were chosen on a seniority basis with two justifiable exceptions. Consequently, even if management did know the specific identity of the union supporters, it does not appear that this was a consideration.[51] Pierson's role in the organizing campaign was discussed by Brown with Respondent's attorney, and it was concluded by Brown that notwithstanding obvious implications Pierson would have to be included in the layoff because of his lack of seniority. In the circumstances, paragraphs 13(a) and (b) and 14(a), (b), and (c) are dismissed.

Respondent admits paragraph 15 of the complaint, *viz*, that the following employees of Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All production and maintenance employees employed by the Respondent at its Livonia, Michigan place of business, but excluding all office clerical employees, professional employees, and guards and supervisors as defined in the Act.

At the hearing it was established that as alleged in paragraph 16 of the complaint by on or about April 24 a majority of the employees of Respondent in the above-described unit had designated and selected the Charging Party as their representative for the purposes of collective bargaining.[52] Also, it was established that the Union made a lawful demand for recognition upon Respondent by letter dated April 24 and that Respondent refused to recognize the Union.

The Supreme Court in *Gissel Packing Co., supra*, affirmed the Board's authority to issue a bargaining order where a union majority is established by cards and the nature and extent of the employer's unfair labor practices render unlikely a free choice by the employees in a Board election.

Respondent argues that, if it committed any unfair labor practice, it was at most an isolated and *de minimis* violation of the Act which does not warrant remedial action.

Pierson began openly organizing on the afternoon of April 21. Later that same day Respondent commenced its unlawful campaign to undermine the Union's support. As indicated above, Respondent, during its campaign, violated Section 8(a)(1) of the Act by threatening on more than one occasion to impose more onerous working conditions if the Union succeeded; threatening that some employees would lose their jobs if the Union succeeded; threatening on more than one occasion to discharge an employee because of his union activity; soliciting employees' complaints both verbally and in writing and impliedly and explicitly, respectively, promising to remedy said complaints; and threatening stricter work rules and layoffs of employees if the Union succeeded. It is my opinion that, in view of the degree and pervasive-

[50] Respondent was advised by the Union that Moore was also a union activist but she was not laid off.

[51] The General Counsel did not theorize in the alternative that an inference of company knowledge should be drawn under the "small plant" doctrine where, as here, a small number of employees work in a small operation.

[52] As noted above, on April 24 of the 26 employees eligible (including the 3 leaders) 21 signed the Union's authorization cards. There is no dispute as to the authenticity of the employees' signatures. The later request of Lang and Borowski for the return of their cards would not affect the majority status.

ness of these unfair labor practices, the holding of a fair election is no longer possible. Respondent, by its conduct, has forfeited the right to an election. A bargaining order is necessary and appropriate to protect the majority sentiment expressed through authorization cards and otherwise to remedy the violations committed.

Respondent was obligated to recognize and bargain with the Union on the basis of the Union's clear majority showing. *K & K Gourmet Meats, Inc.*, 245 NLRB 1331 (1979); and *Trading Port, Inc.*, 219 NLRB 298 (1975). Its bargaining obligation arose on April 24, the date of the Union's demand, inasmuch as the Union by then had achieved majority status and Respondent commenced its clear course of unlawful conduct even before that date. It is obvious that Respondent intended by its unlawful conduct to dissipate the Union's majority status. In view of the nature of Respondent's unfair labor practices it is my opinion that Respondent also violated Section 8(a)(5) of the Act by refusing to recognize and bargain with the Union as the majority representative of its employees while simultaneously engaging in unlawful conduct in an attempt to undermine the Union's majority status and prevent the holding of a fair election.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Charging Party is a labor organization within the meaning of Section 2(5) of the Act.
3. By engaging in the following conduct Respondent committed unfair labor practices contrary to the provisions of Section 8(a)(1) of the Act:

(a) Threatening, on more than one occasion, to impose more onerous working conditions on employees, and threatening that employees could lose their jobs if the Charging Party's organizing campaign were successful.

(b) Threatening, on more than one occasion, to discharge an employee because of his union activity.

(c) Soliciting, on more than one occasion, complaints and impliedly promising to remedy said complaints.

(d) Soliciting employees' complaints and explicitly promising to remedy said complaints.

(e) Threatening employees with stricter work rules and layoffs if the Charging Party's organizing campaign were successful.

4. All production and maintenance employees employed by Respondent at its Livonia, Michigan, place of business but excluding all office clerical employees, professional employees, and guards and supervisors as defined in the Act constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

5. Since on or about April 24, 1980, and at all material times thereafter, the Union represented a majority of the employees in the above appropriate unit, and has been the exclusive representative of all said employees for the purposes of collective bargaining within the meaning of Section 9(a) of the Act; and Respondent was on that date, and has been since, legally obligated to recognize and bargain with the Union as such.

6. By refusing to recognize and bargain collectively with the Union in regard to employees in said appropriate unit on or about and since April 24, 1980, Respondent has committed unfair labor practices prohibited by Section 8(a)(5) of the Act.

7. The above-described unfair labor practices affect commerce within the contemplation of Section 2(6) and (7) of the Act.

8. Respondent has not committed any other unfair labor practices alleged in the complaint.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

It shall also be recommended that Respondent recognize and bargain with the Union upon request and embody any understanding reached in a signed agreement.

In view of the degree and pervasiveness of the unfair labor practices, a broad cease-and-desist order shall be recommended precluding Respondnet from "in any manner" interfering with, coercing, or restraining employees in the exercise of the rights guaranteed them by Section 7 of the Act.

Upon the foregoing findings of fact and conclusions of law, and upon the entire record in this proceeding, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[53]

The Respondent, Vinyl-Fab Industries, Inc., Livonia, Michigan, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening to impose more onerous working conditions if the Charging Party becomes the collective-bargaining representative.

(b) Threatening that employees could lose their jobs if the Charging Party becomes their collective-bargaining representative.

(c) Threatening to discharge an employee because of his union activity.

(d) Promising to remedy employees' complaints to discourage them from engaging in activity on behalf of the Charging Party.

(e) Threatening employees with stricter work rules and layoffs if the Charging Party becomes the collective-bargaining representative.

(f) In any manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them under Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

[53] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(a) Upon request, bargain collectively with District Lodge 60, International Association of Machinists and Aerospace Workers, AFL–CIO, as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Livonia, Michigan, plant copies of the attached notice marked "Appendix C."[54] Copies of said notice, on forms provided by the Regional Director for Region 7, after being duly signed by Respondent's representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 7, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that all allegations of unfair labor practices not found herein are dismissed.

[54] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX C

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
To refrain from the exercise of any or all such activities.

WE WILL NOT threaten employees with more onerous working conditions or a loss of jobs because they have selected a union as their bargaining representative.

WE WILL NOT threaten to discharge an employee because he has engaged in union activities.

WE WILL NOT threaten employees with stricter work rules and layoffs because they have selected the Union as their bargaining representative.

WE WILL NOT solicit employees' complaints during the course of an organizing campaign with the implied or explicit promise that these complaints will be remedied all for the purpose of encouraging employees to reject unionization.

WE WILL NOT otherwise violate the Act directly or indirectly in order to destroy or dissipate the collective-bargaining status of the lawfully designated union representative.

WE WILL NOT in any manner interfere with, restrain, or coerce you in your exercise of any of the rights set forth above.

WE WILL, upon request, bargain collectively with District Lodge 60, International Association of Machinists and Aerospace Workers, AFL–CIO, as the exclusive collective-bargaining representative of all the employees in the unit described below with respect to your wages, hours, and other conditions of employment and, if an understanding is reached, WE WILL put it into a written contract which we will sign. The appropriate unit is:

All production and maintenance employees of Respondent, employed at its Livonia, Michigan plant, but excluding all office clerical employees, professional employees, guards and supervisors as defined in Section 2(11) of the National Labor Relations Act, as amended.

VINYL-FAB INDUSTRIES, INC.